HONEST AND REASONABLE MISTAKE

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1. General Rule

Proudman v Dayman [1941] HCA 28; (1941) 67 CLR 536

Per Dixon J:

"As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.

The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered. But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one.

Indeed, there has been a marked and growing tendency to treat the *prima facie* rule as excluded or rebutted in the case of summary offences created by modern statutes, particularly those dealing with social and industrial regulation. But, although it has been said that in construing a modern statute a presumption as to *mens rea* does not exist (per Kennedy LJ, *Hobbs v Winchester Corporation* [1910] 2 KB 471; 26 TLR 557), it is probably still true that, unless from the words, context, subject matter, or general nature of the enactment some reason to the contrary appears, you are to treat honest and reasonable mistake as a ground of exculpation, even from a summary offence.

There may be no longer any presumption that *mens rea*, in the sense of a specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient in an offence created by a modern statute; but to concede that the weakening of the older understanding of the rule of interpretation has left us with no *prima facie* presumption that some mental element is implied in the definition of any new statutory offence does not mean that the rule that honest and reasonable mistake is *prima facie* admissible as an exculpation has lost its application also.

Doubtless over a wide description of legislation the presumption in favour of its application is but a weak one: See *Maher v Musson* [1934] HCA 64; (1934) 52 CLR 100; [1935] ALR 80; 89 P 7; *Thomas v The King* [1937] HCA 83; (1937) 59 CLR 279; [1938] ALR 37 and three papers referred to in that report (1937) 59 CLR 279, at p305. But it still remains a presumption, and in relation to s30 there appears to be no sufficient reason for treating it as rebutted.

The burden of establishing honest and reasonable mistake is in the first place upon the defendant and he must make it appear that he had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe. The burden possibly may not finally rest upon him of satisfying the tribunal in case of doubt. But, in the present case, the applicant assigned reasons for her alleged belief which neither the magistrate nor the Full Court found convincing or sufficient. Indeed, it may be doubted if she thought at all upon the question whether the person she permitted to drive her car did or did not hold a subsisting licence.

Agreeing as we all do in the view of the Full Court on this question of fact, it is enough to say that there is no support in the circumstances of the case for the defence of honest and reasonable mistake.

The applicant contended, however, that, upon a charge under s30 of permitting a person not being the holder of a licence for the time being in force to drive a motor vehicle on any road, it must be shown, not merely that the driver was unlicensed, but also that the defendant knew it or at all events was indifferent to the question whether he was licensed or not.

This contention was based upon the ground that the very idea of permission connotes knowledge of or advertence to the act or thing permitted. In other words, you cannot permit without consenting and consent involves a consciousness or understanding of the act or conduct to which it is directed. Be it so. Nevertheless the contention fails in its application to the actual terms of the provision. The material words of s30 are: "employs or permits any person not being the holder of such a licence to drive a motor vehicle on any road."

It may be conceded that unless a defendant meant to consent to the three conditions involved in the words (1) drive, (2) a motor vehicle, (3) on a road, he could not be said to have permitted the doing of that thing. But it is to that act that the permission must be directed, not to the absence of a licence. The words "not being the holder of such a licence" do not form part of the act permitted. They are a negative qualification upon the word "person", and operate to exclude persons so licensed

from the class who may not be permitted to drive. There is nothing in the language of the section to suggest that the consent must be directed to the failure of the driver to hold a licence, and the form in which the section is cast indicates the contrary. It is the driving which must not be permitted, that is, unless the driver holds a licence.

The application should be refused."

Per Dixon J in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536, 22 September 1941.

2. Applications of the General Rule

(a) Driving whilst under the influence of intoxicating liquor

In relation to the *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536; [1944] ALR 64 defence, there was no evidence that when the defendant was driving his car he honestly believed that he was not under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of his car. His evidence was that he did not remember driving the car at all. And even if he had honestly held a belief that he was not so affected by liquor as to be incapable of having proper control of his car, such belief would not have been based on reasonable grounds: his blood alcohol level was found to be .265, so that he must have felt drunk; he was driving very erratically; he was aware that he had drunk quite a substantial quantity of beer; and from his own symptoms he could reasonably have concluded that the beer had been a good deal more potent than he had supposed.

Per Newton J:

"As to circumstance (a) in my opinion, this was irrelevant. Section 80B(1) is not concerned with the circumstances under which a person becomes under the influence of intoxicating liquor (or of any drug). Nor does it forbid a person from coming under the influence of liquor or drugs. It simply makes it an offence for a person to drive a motor car while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor car.

This conclusion is, in my opinion, supported by *Armstrong v Clark* [1957] 2 QB 391; [1957] 1 All ER 433, and *August v Fingleton* [1964] SASR 22; see too *R v Wickens* (1958) 42 Cr App R 236. The object of s80B is to prevent persons from driving motor cars, which are very dangerous machines unless properly controlled, if they are so affected by liquor or drugs as to be incapable of having proper control: see, for example, *August v Fingleton*, *supra*. How they become so affected is immaterial.

As to circumstance (b) s80B(1) makes it an offence simply to "drive a motor car while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor car". There is no reference to knowledge or intention. And in my opinion, no implication should be made that in order to commit the offence a driver must know that he is under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of his car, or must be reckless or indifferent as to whether he is in that state, or must intend to drive in that state.

Any such implication would defeat the object of s80B, because it is notorious that one of the effects of alcohol (and of many drugs) is not only to render a person incapable of properly driving a car but also to encourage him not to accept that he is in that condition. Hence, in my opinion, *mens rea* in the sense of knowledge of the relevant facts, or reckless indifference, or intention, is not an element of the offence created by s80B. This conclusion appears to me to be supported by *August v Fingleton* [1964] SASR 22, especially, at pp25, 26; *Armstrong v Clark*, *supra*; *Harding v Price* [1948] 1 KB 695 at p703; [1948] 1 All ER 283, per Humphreys J, and *R v Hyatt* [1945] 4 DLR 439. See, too, *R v Coventry* [1938] HCA 31; (1937) 59 CLR 633; [1938] ALR 420, and *Crichton v Victorian Dairies Ltd* [1964] VicSC 139; [1965] VicRp 6; [1965] VR 49, at pp51, 52.

It is unnecessary to decide whether a driver's honest belief based on reasonable grounds that he was not under the influence of intoxicating liquor or of any drugs (as the case might be) to such an extent as to be incapable of having proper control of his motor car would be a defence to a charge under s80B: see, for example, *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536; *Bergin v Stack* [1953] HCA 53; (1953) 88 CLR 248, especially at p254, per Webb J, pp260-3 per Fullagar J (with whom Williams and Taylor JJ agreed), and pp272, 273 per Kitto J; [1953] ALR 805, and *Crichton v Victorian Dairies Ltd*, *supra*.

In the present case there was no evidence that when Burke was driving his car he honestly believed that he was not under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of his car. His evidence was that he did not remember driving the car at all. And even if he had honestly held a belief that he was not so affected by liquor as to be incapable of

> having proper control of his car, such belief would not, in my opinion, have been based on reasonable grounds: his blood alcohol level was found to be .265, so that he must have felt drunk; he was driving very erratically; he was aware that he had drunk quite a substantial quantity of beer; and from his own symptoms he could reasonably have concluded that the beer had been a good deal more potent that he had supposed."

Per Newton J in *Barker v Bruce* [1970] VicRp 111; [1970] VR 884; MC 50/1969, 15 July 1970.

(b) Aquarium containing European carp a noxious fish – defendant stated that he did not know the species of fish in his aquarium and did not know that European carp was a noxious fish

Parliament in regulating in the public interest activity connected with fish, was intending to place upon persons who kept fish the responsibility for informing themselves whether or not the fish were European carp or other noxious species.

Accordingly, the Magistrate was in error in dismissing the information for the reasons which he noted. The fact that the defendant had not kept the fish in a commercial aquarium and that he did not intend to do mischief to the community by keeping it were relevant to penalty but were not relevant to liability to conviction. It was also relevant to penalty that the defendant did not know that the fish was European carp.

Per McGarvie J:

> "I accept Mr Uren's submission that this is not a case in which it is necessary to consider the general rule that an honest and reasonable belief in a state of facts which, if they existed, would make the respondent's act innocent, affords an excuse for doing what would otherwise been offence. That rule was referred to by Dixon J in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 at 540-41. The respondent did not either in the interview or in his evidence say that be had an affirmative belief that the fish was not a European carp.
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> The effect of what he said was that he did not address his mind to this question at all. That is not enough: *Gherashe v Boase* [1959] VicRp 1; (1959) VR 1 at 3; [1959] ALR 218. The question whether a European carp was a noxious fish within the meaning of Part VI of the *Fisheries Act* was a question of law not a question of fact. As one would expect, the respondent did not indicate any positive belief that a European carp was not a noxious fish. It would not have been a defence if he had had such a belief."

Per McGarvie J in *Rhodes v Peteropoulos* [1979] VicSC 252; MC 51/1979, 4 June 1979.

(c) Defendant stated that he had an honest and reasonable belief in relation to a bill of sale

1. It was argued that it was a defence to a charge of having committed the offence created by s187(1)(c) of the *Companies Act* that the defendant had an honest and reasonable belief in facts which, if true, would have been a defence or which, if true, would have led to the section being not contravened.

2. In the present case, after making every legally permissible inference in favour of the defendant, the proper conclusion was that the mistake which the defendant made may simply in his undoubtedly honest and perfectly reasonable belief that the bill of sale, which he knew to have been executed by the Roto Company in favour of the MGMA Company, did not in law make MGMA Company a mortgagee of the property of' the Roto Company.

3. The matter as to which the defendant had an honest and reasonable belief was a pure matter of law and not a matter of mixed fact and law of the kind indicated and referred to in the judgment of Sir Owen Dixon in *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279; [1938] ALR 37.

Per Fullagar J:

> "Mr Rendit for the defendant respondent, Alex Neville Bird, argued that it is a defence to a charge of having committed the offence created by s187(1)(c) of the *Companies Act* that the defendant had an honest and reasonable belief in facts which, if true, would be a defence or which, if true, would lead to the section being not contravened, and relied upon the decision of the High Court of Australia in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 and particularly upon the judgment of Sir Owen Dixon at p540, In that case, Sir Owen Dixon said:
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> "It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a

> general rule, an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence."
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> The second step of Mr Rendit's argument was that the relevant matter as to which Mr Bird had an honest and reasonable belief was a matter of mixed law and fact which he said was, on final analysis, a question of fact within the meaning of the doctrine referred to in *Proudman v Dayman*. He contended that the essential mistake honestly made by Mr Bird was whether there was in existence a mortgage of the character described in s187(1)(c) of the *Companies Act*.
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> In the course of argument, Mr Rendit relied upon a passage in the judgment of Sir Owen Dixon in the case of *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279 at pp306-7; [1938] ALR 37. In that passage, His Honour pointed out that many questions which involve necessarily questions of law are in reality questions of fact within the doctrine referred to in *Proudman v Dayman*. If a man A marries a woman B in the honest belief that B was once a married woman but has been divorced before his marriage to her, it can, of course, be said that, in a sense, the question of whether or not she was previously divorced is a question of law. But it often is, in my opinion, a question of fact in a very real sense. If A believes that B has been divorced, the belief when analysed includes a belief that at some time in the past, a judge of the appropriate court has pronounced a decree for dissolution of the marriage, that that decree has been duly taken out, that that decree has subsequently become absolute and that the judge who made the decree had jurisdiction to make it, both under the municipal law under which he acted and in accordance with the private international law principles of the Forum in which the marriage of A to B takes place.
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> It is therefore to be seen that A's belief that B has been divorced involves as a matter of legalistic logic a belief in a number of legal propositions, However, in most cases where the belief of A becomes relevant, A being a layman, the critical matter is whether A believes that some Judge has pronounced a decree for divorce which has been made apparently absolute by the execution of a piece of paper, and the question whether those things have been done or not is, in my opinion, a question of fact within the doctrine discussed in *Proudman v Dayman*.
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> In the present case, however, after making every legally permissible inference in favour of Mr Bird which, in all the circumstances, I am prepared to do, I think that the proper conclusion is that the mistake which he made may simply in his undoubtedly honest and perfectly reasonable belief that the bill of sale, which he knew to have been executed by the Roto Company in favour of the MGMA Company, did not in law make MGMA Company a mortgagee of the property of the Roto Company.
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> He knew all the facts upon which the decision of that question could possibly turn. He knew that he was a director and the secretary of the MGMA Company and knew that a bill of sale had been executed in favour of that company by the Roto Company; and, more than that, he knew that a question of law arose as to whether those circumstances made MGMA Company 'a mortgagee of the property of' the Roto Company within the meaning (which is a matter of law) of the sub-section, and upon that question of law he sought the advice of a reputable firm of solicitors. I infer that that firm of solicitors doubtless acting *bona fide* and after due consideration of the question, advised him that the question ought to be answered in the negative and that the facts predicated did not in law make the MGMA Company a mortgagee of the property of the Roto Company for the purposes of the sub-section.
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> In my opinion the matter as to which Mr Bird had an honest and reasonable belief was a pure matter of law and not a matter of mixed fact and law of the kind indicated and referred to in the judgment of Sir Owen Dixon in *Thomas v R*."

Per Fullagar J in *Waldron (Registrar of Companies) v Bird (No 2)* [1975] VicSC 411; MC 39/1975, 22 August 1975.

(d) Owner of motor vehicle licensed to operate a passenger vehicle to carry specific persons in Victoria – licence not granted in respect of interstate trade – journey taken to transport others interstate – belief that such journey was within terms of licence

1. There was no *bone fide* commercial purpose in the mind of the defendant when he drove the vehicle into NSW. He drove the vehicle .9 of a kilometre into the State of NSW for the sole reason that he believed that by so doing the whole journey gained the protection of s92. The character of the operation was always intrastate, because it was in reality a journey between Wodonga and Wangaratta, and the defendant's stratagem did not gain for him the protection of s92 of the *Constitution*. Had the defendant's *bona fide* journey been between Wodonga and Albury it would have been protected by s92.

2. Accordingly, the Magistrate was wrong in holding that s92 afforded the defendant a defence to the information on the facts.

3. The statement of law in *Proudman v Dayman* [1941] HCA 28; (1943) 67 CLR 536 does not mean that a person who has a genuine but mistaken view of the law can escape conviction in a case where intent is not an ingredient of the charge. Ignorance of the law or a mistaken view of the law does not afford an excuse to a wrongdoer.

4. Had the defendant persuaded the Magistrate he honestly believed a licence he held authorised him to make the journey in question, the position may have been otherwise. An honest but mistaken belief by the defendant that the short journey he made into New South Wales afforded him the protection of s92 is no answer to that charge. Such a belief may, however, operate to mitigate the penalty, but it is not exculpatory.

Per O'Bryan J:

> "How can it be said that the defendant, on the facts before the Magistrate in this case, made a *bona fide* journey interstate? The journey was between Wodonga and Wangaratta, carrying passengers to a football match. The diversion into NSW was what Taylor J referred to 'as a superficial excrescence on the journey and not as a factor capable of transforming its real character.' (103 CLR 452 at 472)
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> There was no *bone fide* commercial purpose in the mind of the defendant when he drove the vehicle into NSW. He drove the vehicle .9 of a kilometre into the State of NSW for the sole reason that he believed that by so doing the whole journey gained the protection of s92. The character of the operation was, in my opinion always intrastate, because it was in reality a journey between Wodonga and Wangaratta, and the defendant's stratagem did not gain for him the protection of s92 of the *Constitution*. Had the defendant's *bona fide* journey been between Wodonga and Albury it would have been protected by s92. In my opinion, the Magistrate was wrong in holding that s92 afforded the defendant a defence to the information on the facts before him.
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> In the course of giving his reasons for dismissing the information, the Magistrate added that even if he had not dismissed the information on that ground he would have dismissed it on the authority of *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536.
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> Lest the Magistrate should take this course when the matter is before him again, it is desirable that I refer to *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536. In that case Dixon J (as he then was) said: 'As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence'. I have never understood that statement of law to mean that a person who has a genuine but mistaken view of the law can escape conviction in a case where intent is not an ingredient of the charge. Ignorance of the law or a mistaken view of the law does not afford an excuse to a wrongdoer.
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> Had the defendant persuaded the Magistrate he honestly believed a licence he held authorised him to make the journey in question, the position may have been otherwise, but I do not have to decide that point as it did not arise. An honest but mistaken belief by the defendant that the short journey he made into New South Wales afforded him the protection of s92 is no answer to that charge. Such a belief may, however, operate to mitigate the penalty, but it is not exculpatory, in my opinion.
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> In my opinion, for the reasons given, the two grounds of the order nisi have been sustained. On the evidence before the Magistrate the defendant ought to have been convicted."

Per O'Bryan J in *Stoneham v Klose* [1977] VicSC 122; MC 32/1977, 25 March 1977.

(e) Overloaded truck – driver mistakenly thought he could carry a certain maximum weight – driver chose weight given by police officer which was wrong – whether driver had an honest and reasonable belief that he was carrying the legal weight

HELD: The evidence before the Magistrate did not support a finding of an honest and reasonable mistake of fact on the part of the respondent. The defendant's belief could not be said to be based on any reasonable grounds. It was based upon the taking of a chance as to which figure was correct and the evidence did not sustain a finding that the defendant possessed a state of mind based on an honest and reasonable mistake.

Per Crockett J:

> "The belief as to the legality of what he is doing must be reasonably held by the respondent. Such belief as he had was one based on an enquiry made out as to what permission any permit he had

relating to weight carrying extended to him with respect to his vehicle, but it was a belief based upon what some police officer had told him was permissible under the law. I think the contention of counsel for the applicant is correct; namely, that such a belief was one of law and not a mistake of fact. In any event it was not a belief as to what the conditions of the permit were.

Furthermore, I think the applicant's counsel's contention is correct when he submits that the belief, such as it was, could not be said to have been based on any reasonable grounds. It was based upon the taking of a chance as to which figure, as given to the respondent, was correct and therefore I think it is plain that if any answer rests upon possession of a state of mind resulting from an honest and reasonable mistake, the evidence in this case would not sustain any such finding. ..."

Per Crockett J in *Powell v Tsivoglou* [1982] VicSC 12; MC 16/1982, 3 February 1982.

(f) Special permit – provisions of permit exceeded – overloading – whether honest and reasonable belief was a defence

Failure to comply with s35(5) of the *Motor Car Act* 1958 imposes a strict liability upon a driver. The defence of honest and reasonable mistake is not open.

Proudman v Dayman [1941] HCA 28; (1941) 67 CLR 536, discussed.

Per Young CJ:

"The question presented for decision by this order to review is whether the provisions of the *Motor Car Act* restricting the weight which may be carried in a motor vehicle impose a strict liability for an infringement or whether "an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence" (see per Dixon J in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 at p540).

[After setting out the facts and the provisions of s35(1) of the Motor Car Act *1958, His Honour continued]:* It was common ground that a special permit was required and that the permit granted under s35 of the Act allowed the total weight of the defendant's vehicle and load to be 27.5 tonnes. It is useful to begin by quoting the paragraphs following immediately the quotation from Dixon J's judgment in *Proudman v Dayman* which I have set out above for they show clearly the criteria upon the basis of which the case must be decided. Having said that as a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse, His Honour went on: *[His Honour then quoted from Dixon J's judgment, referred to some of the provisions of Div 2 of Part IV of the* Motor Car Act *1958, and said]:* It is thus apparent that the purpose of Division 2 is in part public safety and in part protection of the use of the roads. It was not contended before us that the offence was one in which it was incumbent upon the informant to prove that the defendant knew that the gross weight of the vehicle exceeded the weight allowed by the permit. I think this view of the sub-section is clearly right. There is probably now no presumption that *mens rea* is a necessary ingredient in modern statutory offences.

However, as Dixon J pointed out in *Proudman v Dayman* in a paragraph just before those I have quoted, it is one thing to deny that a necessary ingredient of the offence is positive knowledge on the part of the defendant that the gross weight of the vehicle exceeded that allowed by the permit, but quite another to say that an honest belief on reasonable grounds that it was not being exceeded cannot exculpate the defendant. It seems to me that these two considerations are not always kept entirely separate in some of the authorities where the discussion includes the question whether *mens rea* is a necessary ingredient of the offence. The necessity on the part of the informant to prove that the defendant had knowledge of the facts may properly be described as a necessity to prove *mens rea*. Where a defence of honest and reasonable mistake is relied upon, however, I think it is preferable not to speak of *mens rea*. The burden of establishing honest and reasonable mistake is in the first place on the defendant.

How then is it to be decided whether the defence of honest and reasonable mistake is to be available in a case such as the present? The answer is to be found in the terms of the statute: see the discussion by Wills J in *R v Tolson* [1886-90] All ER 26; 9 WR 709; (1889) 23 QBD 168 at pp172-176. The nature of the matters with which the *Motor Car Act* is concerned is peculiarly public safety. The notorious dangers of travel on modern highways and the necessity for strict control of the handling of motor vehicles on those highways suggest that if ever the intention to be imputed to Parliament is to impose strict responsibility, it is likely to be in statutes dealing with the control and handling of motor vehicles.

I have endeavoured to show that the purposes of the part of the *Motor Car Act* in which s35(5) is found are public safety and protection of the use of the roads. In matters of public safety it is not difficult to impute an intention to the legislature to impose strict responsibility: *Provincial Motor Cab Co Ltd v Dunning* (1909) 2 KB 599; *Green v Burnett; James & Son Ltd v Smee* [1955] 1 KB 78;

[1955] 1 QB 78 at pp93-4; [1954] 3 All ER 273; (1954) 3 WLR 631. And I think that in view of the notorious problems faced by authorities concerned today with the maintenance of highways used by heavy transport it is also not difficult to impute an intention to the legislature to impose strict responsibility for adherence to limitations of the weight to be carried. Some of those problems can be discerned from a study of the transport cases in the High Court culminating in *Armstrong v Victoria (No.2)* [1957] HCA 55; (1957) 99 CLR 28. I also think that the history of the legislation which has been set out by McInerney J in his reasons which I have had the advantage of reading supports the conclusion that the legislature intended to impose strict responsibility.

The conclusion that I would reach from a consideration of the general provisions of the statute is reinforced by a consideration of the language of s35(5) although of course it stops short of expressly negativing the defence of mistake. The fact that the maximum penalty is not particularly heavy also assists in this conclusion. The provision for the additional penalty and the proviso expressly conferring upon the Court a discretion not to impose the additional penalty in certain circumstances strongly suggests that the legislature intended to exclude the defence of honest and reasonable mistake as a ground of exculpation from the offence.

Notwithstanding these conclusions I have been troubled by the fact that the defendant's vehicle was carrying a container and that it might be thought that there was little that the defendant could have done to bring himself within the law. Is this a case of the kind referred to by the Privy Council in *Lim Chin Aik v R* (1963) AC 160 at p174; [1963] 1 All ER 223; (1963) 2 WLR 42 where Lord Evershed for the Board said that it was not enough merely to show that the statute was one dealing with a grave social evil? Is it a case where it would be absurd to suppose that the legislature intended to expose an innocent carrier who could not be aware of the true facts to a penalty: see *Maher v Musson* [1934] HCA 64; (1934) 52 CLR 100; [1935] ALR 80; 89 P 7 per Evatt and McTiernan JJ at p109?

I have ultimately come to the conclusion that the putting of the defendant under strict liability is necessary for the enforcement of the statute. In such a case the exclusion of the defence of honest and reasonable mistake inevitably means that individuals are called upon so to conduct their affairs that the general welfare is not prejudiced and to that extent the rights of the individual are subjected to the common good. I think that the class of person included in s35(5) shows that the legislature regards the legislation as being of that character and therefore intends that the defence of honest and reasonable mistake should be excluded. It may be that the owner, for instance, will have to improve his business methods or take some other action to ensure that the provisions of a permit are obeyed, but I see no reason why this should not be done. It may be more difficult for the driver.

But it is not a case like *Maher v Musson* where the breach arose from antecedent breaches of the law generally by other persons: see 52 CLR at p106 per Dixon J. We were pressed with some decisions of the Full Court of South Australia. These have been examined in the reasons prepared by Southwell J which I have had the advantage of reading. I wish only to refer to the judgment of Bray CJ in *Kain & Shelton Pty Ltd v McDonald* (1971) 1 SASR 39 and to the passage quoted by McInerney J in his reasons. The passage has considerable force but, if I may say so with respect, a statute must be construed against the whole background of the law which includes the principles by which the question whether the presumption that honest and reasonable mistake provides a defence has been excluded is to be determined. For very many years now the Courts have had to grapple with this problem but I detect no ready assumption that Parliament intends to exclude the defence. It is only after prolonged consideration that I have reached the conclusion that it is to be excluded in the present case.

It follows that the order nisi should be made absolute. Having regard to the fact that the Magistrate was of the opinion that the defendant believed on reasonable grounds that the vehicle and load were not overweight, I agree in the suggestion made by McInerney J that instead of sending the information back to the Magistrate we should ourselves convict the respondent and impose a nominal penalty."

Per McInerney J:

"... It becomes necessary to determine whether the prosecution must prove that the defendant is liable irrespective of his state of mind or his belief that he was not carrying excess weight. Is it a case where he can defeat the charge by proving that he believed on reasonable grounds that he was not carrying excess weight?

... In my opinion the true rule governing this matter is that stated by O'Bryan J in *McCrae v Downey* [1947] VicLawRp 25; (1947) VLR 194 at pp202-3; [1947] ALR 157, as follows:

> "From these authorities I take the rule to be that honest and reasonable belief in a state of facts which, if true, would take the defendant outside the defence charged, is a good answer to a statutory offence, unless the language used clearly excludes that defence, or unless, although the language leaves the matter in doubt, the object and scope of the enactment, the nature of the

duty imposed, or other considerations arising from the subject matter of the legislation, make it probable that the legislative authority intended to impose a duty of absolute responsibility..."

... For reasons which I have already discussed I find some difficulty in seeing what it is that the defendant could do by inspection, improvement of his business methods or exaltation to prevent a mistake of this character arising given the circumstances which I understood to prevail in the taking of delivery of goods at the wharf. *[After referring to a line of South Australian authorities, His Honour said]:* I think, however, the general scheme of Part IV of the *Motor Car Act*, taken in conjunction with its legislative history, particularly the amendments as to additional penalty introduced in sub-s (5) of s35 of Act 6628, is too intractable to permit of the conclusion that the defence of honest and reasonable mistake is open. I am accordingly impelled to conclude that the Magistrate erred in law in dismissing this information, and that the order nisi should be made absolute and the dismissal of the information set aside."

Per Southwell J:

[His Honour then referred to other authorities and the provisions of Part IV of the Act. In relation to the proviso to s35(5), His Honour continued]: 'The presence in the section of that proviso lends strength to the submission of Mr Uren that strict liability here exists. Where the legislature casts upon a defendant the onus of establishing difficulty or impossibility of avoiding the carriage of excess weight, not as a defence to the charge, but merely as a mitigating factor relevant to the imposition of an additional penalty, I find difficulty in accepting that the legislature intended that proof of a belief that the vehicle was not of excess weight could constitute a complete defence.

Section 36 confers powers on certain inspectors and members of the Police Force to weigh vehicles with "portable mechanical devices", and provides a penalty of not more than $360, or imprisonment for a term of not more than 7 days, for failure to comply with lawful requests relating to the weighing of vehicles. Division 3 relates to the imposition of limits upon periods of driving of motor trucks, the keeping of log books in respect thereto, and there are penal provisions for non-compliance. Part V of the Act deals with third party insurance. Part VI relates to offences and legal proceedings.

It will thus be seen that Part IV relates principally to matters of safety, but also, and more specifically, (for example, s32(1)) to matters of road wear. The power in the Board to grant such a special permit as is here relevant is to be exercised "having regard to the nature of the construction and to the condition of any state highway..." All of the matters referred to deal with physical items which may be seen, measured or checked by the owner or driver of a vehicle. This factor, in my opinion, renders the case very different indeed from cases such as *Sherras v DeRutzen* and *Lim Chin Aik v R* where, as I have earlier stated, the alleged offender had no knowledge of or means of acquiring knowledge of the facts giving rise to the alleged offence. The provisions in Part IV creating offences do not use the word "knowingly" or "wilfully" (contrast, for example, s28(9)), a factor, which, although by no means conclusive, is not to be regarded as irrelevant. (See *Maher v Musson* (*supra*) per Evatt and McTiernan JJ, at CLR p108; *Dowling v Bowie* [1952] HCA 63; (1952) 86 CLR 136; [1952] ALR 1001, per Williams and Taylor JJ at CLR p150: *Hawthorn v Bartholomew* [1954] VicLawRp 4; (1954) VLR 28 at p30; [1954] ALR 144.)

The "context of the subject matter", the "general nature of the enactment" (*Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 per Dixon J at CLR p540) and the consideration (referred to above) of the proviso to s35(5) of the Act lead me to the conclusion that a failure to comply with s35(5) of the Act imposes strict liability upon the driver."

Per Young CJ, McInerney and Southwell JJ in *Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173; MC 11/1983, 13 December 1982.

(g) Drug offence – possession of prohibited imports – defences available – honest and reasonable mistake

On a charge of being in possession of prohibited imports contrary to s233B(1)(ca) of the *Customs Act* 1901 (Cth.), the offence is committed only if the supposed offender knows that the object possessed is or is likely to be a narcotic substance. An offender whose suspicions were aroused that the object was probably narcotic goods, but who refrained from making any enquiries for fear that he may learn the truth was to be treated as knowing that the object was narcotic goods.

He Kaw The v R [1985] HCA 43; (1985) 157 CLR 523; (1985) 59 ALJR 620, 60 ALR 449; 15 A Crim R 203; principles stated by Brennan J applied.

Per Nathan J (with whom Murray and McGarvie JJ agreed):

"While this is not the appropriate occasion to seek to make an exhaustive analysis of what principle emerges from the decision of the High Court in *Teh's case* [1985] HCA 43; (1985) 157 CLR 523; (1985)

> 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, which should be applied in directing juries in cases of offences charged under s233B(1)(ca) of the *Customs Act* 1901, I consider that we should give some guidance to trial judges in Victoria because doubt has been expressed as to the correct direction which should now be given as a result of that decision. I think that the task of resolving this problem should not be left to trial judges involved in the numerous pressures of a criminal trial. Until the doubt is authoritatively determined for this jurisdiction by a decision of the High Court or a further decision of this court, in my opinion directions should be given by trial judges in Victoria in accordance with the principles stated by Brennan J. Under that principle the offence is committed only if the supposed offender knows that the object possessed is or is likely to be a narcotic substance. Within that principle an offender whose suspicions are aroused that the object is probably narcotic goods, but who refrains from making any enquiries for fear that he may learn the truth, is to be treated as knowing that the object was narcotic goods. This concept was discussed by Gibbs CJ, with whom Mason J agreed. The alternative view as to the principle which emerges from the High Court decision is that stated by Dawson J. The view of Dawson J was that a supposed offender who has custody or control of an object which is in fact narcotic goods, was to be treated as being in possession of narcotic goods if he knew of the presence of the object, although he did not know that the object was narcotic goods...."

Per Nathan J (with whom Murray and McGarvie JJ agreed) in *R v Saad* [1985] VicSC 627; [1985] 19 A Crim R 170; MC 39/1986, 6 December 1985.

(h) Theft of motor vehicle – defendant found to have had honest belief at time of appropriation

It is fundamental to the law relating to theft that the appropriation must be dishonest. Accordingly, a defendant could not be properly convicted of the offence of theft of a motor car where the Magistrate found that the defendant had an honest belief that she had permission to take the motor car.

Per Harper J:

> "... Mr Smith made allegations that the vehicle had been driven away by the appellant without his permission. The appellant was subsequently charged with theft of the vehicle. That was one of the charges which was before the Magistrate on 16 August. Having heard the evidence for the prosecution and the defence, the Magistrate concluded, and I quote from the affidavit of the appellant sworn of 5 September 1991:
>
> > "I find that the defendant had an honest belief that she had permission to take the car, but in the circumstances it was not a reasonable belief. The defendant was, in my view, affected by alcohol to a significant degree. She may well have misinterpreted what was said to her or done. I therefore find the matter proved."
>
> On the basis of that finding, the appellant appealed to this court. Her principal submission is that having found that she had an honest belief, it was not open to the Magistrate to convict her of the offence of theft. That offence is defined in s72 of the *Crimes Act* 1958 in the following terms:
>
> > "A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it."
>
> It is fundamental to the law relating to theft that the appropriation must be dishonest. It is, in my opinion, fundamental to the definition of dishonesty that the person charged does not have an honest belief that the appropriation, if proved, is one that the accused is entitled to effect. If this is right then it follows that once the Magistrate had properly found an honest belief in the defendant that she had permission to take the car, it was not open to him to come to the further conclusion that she was guilty of theft.
>
> Mr Gebhardt who appeared for the respondent on this appeal accepted, as I understand him, the propositions of law to which I have just referred. He argued, however, that it was not open to the Magistrate to find that the defendant had an honest belief. In support of that submission, Mr Gebhardt took me to certain questions and answers recorded in a record of interview made between the appellant and the informant/respondent at the Heidelberg Police Station on Sunday, 24 February 1991. I have read the questions and answers to which my attention has been drawn.
>
> Although, no doubt, it might be said that the evidence thus put before the court is not entirely without ambiguity, it cannot be said, in my view, that no reasonable Magistrate could, on the basis of that evidence, have found that the defendant had an honest belief. It follows that I cannot interfere with the finding of the Magistrate that the defendant had an honest belief, and it further follows, once that finding is accepted, that the defendant could not be properly convicted of the offence of theft. Accordingly the appeal must be dismissed."

Per Harper J in *Heywood v Canty* [1993] VicSC 15; MC 18/1993, 21 January 1993.

(i) Failing to stop/render assistance/report to police – categorisation of offences – whether involving strict liability – whether defence of honest and reasonable mistake available

1. For the purpose of considering criminal intent, statutory offences fall into three categories:
(1) Prosecution must prove *mens rea* as an essential ingredient of the offence
(2) Prosecution must negative evidence of the defendant's honest and reasonable belief
(3) absolute offences or ones of strict liability.

2. The provisions of s61(1) of the Act do not create absolute offences nor impose strict liability. That is, s61(1) does not create Category 3 offences.

3. Having regard to the relative seriousness of the offences and other matters, s61 offences do not fall within Category 2 offences involving the defence of honest and reasonable belief. Section 61 requires that the appropriate mental element be proved by the prosecution as an essential ingredient of the offence.

4. To establish an offence under s61(b) or (e) of the Act it must be proved that there was actual knowledge on the part of the driver that an accident had occurred and that a person was injured. Where a driver knew he had been in a collision but did not know he had hit a person, a magistrate was in error in finding proved charges laid pursuant to s61(1)(b) and (e) of the Act.

5. In relation to a charge under s61(1)(a) of the Act, the prosecution must show there was appreciable damage to property other than the defendant's motor vehicle.

Per Teague J:

> "... *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 is the leading case dealing with the categorisation of statutory offences for the purpose of considering criminal intent. As a very general proposition, it is possible to say that such offences fall into three categories. To none of those categories it is easy to give a satisfactory label. The first category covers offences in which there is an original obligation on the prosecution to prove *mens rea* as an essential ingredient of the offence. The second category has commonly been referred to as covering the middle ground. It relates to offences where *mens rea* will be presumed to be present unless and until some evidence is advanced by the defendant that he had an honest belief in facts which would make his act lawful, and some evidence or basis for thinking that it was on reasonable grounds, in which circumstances the onus is on the prosecution to disprove honest belief on reasonable grounds beyond reasonable doubt. The third category is also not easy to give a label to, as it apparent from two relatively recent decisions of the Victorian Full Court in *Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173 and *Kearon v Grant* [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377. In each case the court held that a statutory provision creating an offence was intended to create an offence in the third category and not an offence in the middle ground.
>
> ... From what was said in *He Kaw Teh*, I am satisfied that, when addressing the issue of the appropriate classification of an offence created by a statutory provision, I should have regard to, at least, the proper construction of the section, the mischief which the section is designed to remedy, the context in which the section stands in the statute, the subject matter of the statute itself, and whether putting the defendant under absolute liability would assist in the enforcement of the statute.
>
> There can only be a limited benefit to be gained by examining the different circumstances in which courts have gone about this exercise with other statutory provisions. That limited benefit lies in becoming better acquainted with the process. The process resulted in a full *mens rea* classification in *He Kaw Teh* as to an offence under the *Customs Act* of importing heroin. In *Welsh* and *Kearon*, the two Victorian cases I earlier referred to, the analysis resulted in the classification of the offence being considered as one of strict liability. *Welsh* was decided before *He Kaw Teh*. *Kearon* was decided after, but without reference to *He Kaw Teh*.
>
> Then there are the cases in which the analysis resulted in a classification of the offence as one allowing for an "honest and reasonable belief" defence. They include *Chiou Yaou Fa v Morris* [1987] NTSC 20; (1987) 46 NTR 1; (1987) 87 FLR 36; (1987) 27 A Crim R 342, as to an offence under the *Fisheries Act* of being in the Australian Fishing Zone, *R v Wampfler* (1987) 11 NSWLR 541; (1987) 34 A Crim R 218, as to an offence under the *Indecent Articles and Classified Publications Act* of publishing an indecent article, *Caralis & Ors v Smyth* (1987) 34 A Crim R 193; (1988) 65 LGRA 303, as to an offence under the *Heritage Act* of demolishing a building protected by a heritage order, *Binskin v Watson* (1990) 48 A Crim 33, as to an offence under an ordinance under the *Local Government Act* of driving

an overweight vehicle, and *Jiminez v R* [1992] HCA 14; (1992) 173 CLR 572; 106 ALR 162; 15 MVR 289; 59 A Crim R 308; 66 ALJR 292, as to an offence under the NSW *Crimes Act* of culpable driving.

Not without reservation, I have concluded that offences under s61 are to be given a full *mens rea* classification, that is that they are to be treated as requiring the appropriate mental element to be proved as an essential ingredient of the offence. Before I state the reasons why I have reservations, and why I have nonetheless come to the conclusion I have, I would make these comments as to s61 and the Act in which it appears. The Act draws together a number of provisions directed at safer, more responsible driving. Other parts of the Act are more focused than Part 6, which contains s61. Part 6 covers a variety of offences. A broader construction might be seen to be needed given that the words have to cover diverse situations. Section 61 is framed to achieve a number of purposes. One purpose is to maximise the prospect that any person injured in a motor vehicle accident is appropriately assisted and that the owner of any property damaged in such an accident is appropriately informed. Another purpose is specify the obligations which the law imposes on the driver of a vehicle involved in an accident. Another is to spell out, with somewhat more than the usual attention to detail in sub-ss(3) to (7), the penalties for breach of those obligations. With the references in the section to damage to property, there is also a reference to the owner of the property, which may be thought to leave uncertainty as to the position where the ownership of property damaged is not, or not readily ascertainable.

... I have nonetheless concluded that s61 charges are not in the middle ground. That is partly because of my assessment of the relative seriousness of the offences created by the section, as reflected in the penalties imposed, which are relatively harsh, and partly because what has been said in the "failing to stop" cases from *Hubbard* through to *Barker* is strongly supportive of a full *mens rea* categorisation, although the courts did not directly carry out a categorisation analysis. I have taken particular note of Newton J having said in *Barker* that the offence of failing to stop "does involve an element of *mens rea*".

The third of those circumstances was that the car Robinson was driving continued to be capable of being driven as if it had not been damaged. Having noted those matters which seem to me to operate quite strongly against drawing the inference that Robinson must have known that he had been in an accident in which appreciable damage had been caused, I come back to the circumstances which operate the other way. It is clear from what Robinson said in the record of interview that the noise that he heard was a loud one. It is also clear that he was aware that the car's change in direction was a major one. If those two matters had not had to be taken with the other matters I have detailed, as if the collision had occurred in a suburban street with no other traffic about, it seems to me that the drawing of an inference as to the driver's state of mind would be inescapable. Because I am not able to form a satisfactory conclusion on the material before me, and because the learned magistrate has evidence available to him that I do not have, I have concluded that the most appropriate course is for me to refer back to him the further consideration of this matter. ..."

Per Teague J in *Robinson v Fisher* [1993] VicSC 455; [1993] ACL Rep 130 VIC 201; MC 13/1994, 31 August 1993.

(j) Drink/driving – whether offence under s49(1)(f) of *Road Safety Act* 1986 is one of strict liability – whether defence of honest and reasonable mistake available

The legislature has established an increasingly strict regime with respect to drink/driving offences designed to protect the community. There would seem to be little doubt that the offence established by s49(1)(f) of the *Road Safety Act* 1986 ('Act') is to be regarded as one of strict liability. Accordingly, the defence of honest and reasonable mistake is not available with respect to the offence established by s49(1)(f) of the Act.

Welsh v Donnelly [1983] VicRp 79; [1983] 2 VR 173, applied.

Per Vincent J:

"... On its proper construction, the argument proceeded, s49(1)(f) falls into the line of offences considered *by Welsh v Donnelly* (*supra*) (overloaded vehicles); *Kearon v Grant* [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377 (speeding); and *Pilkington v Elliot* [1991] VicSC 510 (driving unregistered vehicle). Acknowledging the force of the arguments advanced on behalf of the appellant, I am of the opinion that the defence of honest and reasonable mistake is not available with respect to the offence established by s49(1)(f) of the *Road Safety Act* 1986. I do not think that it is necessary to set out the history of this section or the structure within which it is contained. It is sufficient, I think, to state that over the years the legislature has established an increasingly strict regime with respect to drink driving offences designed to protect the community.

There would seem to be little doubt that, at least since the decision in *Welsh v Donnelly*, and consistent

> with this approach, s49(1)(f) has been regarded as one of strict liability. Although the provision has been the subject of repeated examination in this Court over a number of years, there is nowhere to be found, as I understand the situation, any pronouncement or indication in any of many judgments handed down, that this is not the case. For good or ill, the position is, in my opinion, fairly clear. I do not consider that the Magistrate fell into error in deciding as he did. ..."

Per Vincent J in *Skase v Holmes & Anor* [1995] VicSC 555; MC 03/1996, 11 October 1995.

(k) Use of unregistered vehicle – whether offence of strict liability – whether defence of honest and reasonable mistake available

The courts have considered a number of factors in determining whether an offence is one of strict liability. These include firstly, that the penalty imposed is monetary; secondly, that there is no stigma attaching to a conviction; and thirdly, that the defendant is able to comply with the provision with relative ease. All of these features adhere to s7 of the *Road Safety Act*. The words of s7 simply prohibit a person owning a motor vehicle or trailer which is used on a highway and is unregistered. On its face the clear and concise language in which the provision is couched, together with its objective form, clearly indicate a legislative intention to impose strict liability upon the owner of an unregistered vehicle used on a highway. Having regard to the purpose, wording and characteristics of s7, honest and reasonable mistake is not a defence to a charge under s7(1)(b) of the Act.

Per Coldrey J:

> "... Accordingly having considered the purpose, wording and characteristics of the section I am of the view that honest and reasonable mistake is not a defence to a charge under s7(1)(b) of the *Road Safety Act*. It follows from this conclusion that it was not open to the Magistrate to hold that there was a reasonable doubt founded upon the discharge by the defendants of the evidentiary onus cast upon them of raising the issue of honest and reasonable mistake of fact."

Per Coldrey J in *Pilkington v Elliott* [1991] VicSC 510; MC 20/1997, 27 September 1991.

(l) Importing an ozone depleting substance without a licence – whether such offence involves absolute or strict liability

1. It was open to the magistrate to conclude that SP/L's belief was not reasonably grounded and find that the defence of honest and reasonable belief had been negatived by the prosecution beyond reasonable doubt.

2. *Obiter*. The legal presumption that *mens rea* is an essential ingredient in every serious offence may be displaced by the words of the statute creating the offence or the subject matter with which it is concerned. The Act falls into the category of public safety legislation that is intended to protect all Australians. The potential risk to public health and the environment arising from uncontrolled importation of HCFCs is self-evident. Other relevant factors include the language of s13(1), the monetary penalty and the licensing procedure pointing to a regulatory offence. Having regard to all of these factors, the offence created by s13(1) of the Act is an absolute liability offence.

Per Hedigan J:

> "... 17. The categorisation of the offence as one requiring strict liability, that is, allowing a defence of honest and reasonable mistake, has the virtue of protecting the so-called luckless victim. Counsel for the respondent suggested such a case might be if Selectrix had ordered a consignment of the earlier R134A gas (not containing an HCFC) but had been supplied with FR12, there clearly would be available a defence of honest and reasonable mistake of fact that the imported substance was not an HCFC. This presumably was put on the basis of contrasting the reasonableness of the conduct of Mr Stuckey in this case with, say, an error made by the supplier.
>
> 18. Question 2 appears to raise the question as to whether or not, if the appellant's belief was that the goods were "ozone friendly", that was a mistake of fact reasonably grounded. Leaving aside the honesty aspect, it was accepted that the prosecution was obliged to prove that the defendant did not act under a reasonable mistake of fact, viz. that the imported substance was not an HCFC. The Magistrate so decided. There was no "strict liability" mistake of fact here because Selectrix ordered and received the gas FR12 which was in fact an HCFC. Thus the argument was advanced that any mistake made was whether it was necessary to obtain a licence for importation of FR12, arguably a mistake of law.
>
> 19. Some reliance was placed upon the statements of Dixon J in *Thomas v The King* [1937] HCA 83;

(1937) 59 CLR 279; [1938] ALR 37, (a case involving a belief that the prospective wife to a marriage had had a previous marriage dissolved) that if the mistake was as to a question of mixed fact or law it should be treated as an mistake of fact. It would appear that in *Strathfield Municipal Council v Elvy* (1992) 25 NSWLR 745 at 749-751; (1992) 58 A Crim R 352; (1992) 75 LGRA 390 the view of the New South Wales Court of Appeal is that, in a case of a defence raised to a strict liability offence, not only will a mistake of law not constitute a defence, neither will a mistake on a question of mixed fact and law.

20. In my view, the mistake in this case was in respect of a mixed fact and law issue. The respondent argued that Mr Stuckey's evidence carried the matter no further than a belief that the goods were "ozone friendly". It was put that this was not a mistake as to an exculpatory fact because it was not a mistake as to whether the substance was an HCFC being only a mistake as to the qualities of the substance, e.g. as to a mistake as to whether heroin was harmful. I do not find it necessary to decide this conundrum.

21. The Magistrate considered the issue and expressed his conclusion on the assumption that the mistake was a mistake of fact. He went ahead to consider whether or not there was a reasonable mistake, specifically whether the prosecution had rebutted the presumption that that mistake of fact was reasonable. The Magistrate found that it was established that the appellant's belief was unreasonable. That is, there was no reasonable mistake of fact as to whether the substance imported was an HCFC.

23. In my opinion, it is impossible for me to conclude that it was not open to the Magistrate to take the view, having regard to those facts, that Mr Stuckey's belief was not reasonably grounded. This would be so whether the belief was specifically that it was ozone-friendly, or the absence of any belief that it was not ozone-friendly. In my judgment, this conclusion is sufficient to dispose of this appeal, that is, that it was open to the Magistrate, who, having arrived at a consideration of the strict liability issues and not treating the case as one of absolute liability, found the law for the company, but the facts against it. In my view, the magistrate was correct in reaching the conclusion that he did reach. ..."

Per Hedigan J in *Selectrix Pty Ltd v Humphrys* [2001] VSC 45; 159 FLR 348; MC 38/2001, 1 March 2001.

(m) Exceeding speed limit – proof of testing, sealing and use of speed measuring device

The defence of honest and reasonable mistake of fact did not apply.

Kearon v Grant [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377, applied.

Per Macaulay J:

"**Honest and reasonable mistake**

68. Mr Agar's third fundamental complaint was that the defence of honest and reasonable mistake should be available for the offence with which he was charged, at least in circumstances where the alleged speed is within the "grey" area of the vehicle's speedometer error tolerance.

69. In this case the alleged speed of 75kph was within plus or minus 10 per cent of 70kph – although I note that the actual speed indicated by the Gatsometer was 78 kph, just outside the 10 per cent range. Be that as it may, Mr Agar sought to distinguish the decision of the appeal division of this Court in *Kearon v Grant* [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377 because that case concerned an allegation of grossly excessive speed whereas his case does not.

70. In *Kearon* Brooking J, with whom Kaye and Murphy JJ agreed, said at VR 323 –

... I think it clear that the defence, as I shall call it, of honest and reasonable belief is not open on a charge under this regulation of exceeding the speed limit. In my view, the subject matter and character of this regulation are such as to make it likely that the exclusion of this defence was intended.

These speed limits are imposed by the regulations in the interests of road safety. This must be apparent to all without having regard to the title of the regulations, the *Road Safety (Traffic) Regulations* 1988, or the title of the Act under which they are made, the *Road Safety Act* 1986, or to the objects of the Act and regulations as stated in s1 of the Act and cl102 of the regulations. If ever one might expect an intention to impose strict responsibility, it would be in relation to this offence of driving a motor vehicle at an excessive speed. ....

Speeding motor cars have become dreadful engines of destruction. The cost to the community in terms of death and injury and economic loss has been enormous. I would expect a provision of this kind to require drivers to keep within the applicable speed limit at their peril. If the defence

> of honest and reasonable belief were applicable, then mistakes could be of two kinds. There could be a mistake of fact, the fact bearing on whether one was in a speed zone, and there could be a mistake of fact as to the speed at which the vehicle was travelling. I think that the intention here is that motorists shall at their peril be aware of the applicable speed limit, and shall then at their peril so govern their speed as to keep within it. I do not think that they can be heard to say, except in mitigation, that a badly parked pantechnicon obscured a speed restriction sign from their view, or that a power failure at night led them to believe that there was no provision for street lighting along the road, or that they believed their faulty speedometer to be working properly, as in *Hearn v McCann* (1982) 29 SASR 448; (1982) 5 A Crim R 368, or that for any other reason they believed they were not breaking the speed limit. Human ingenuity and human nature being what they are, I should not expect the law to recognise mistake as a defence to a charge of this kind.
>
> 71. There have been no other iterations of the purposes and objects of the *Road Safety Act* to suggest that any purpose different from that considered by Brooking J should be inferred. The force of his Honour's reasoning still applies – so does the authority of the decision.
>
> 72. Mr Agar incorrectly assumed that the offence with which the driver in *Kearon* was charged was, by definition, an offence involving speed of at least 25 kph in excess of the speed limit. He misapplies the defined term "excessive speed infringement" in s3 of the *Road Safety Act* to the circumstances of that case. It only has relevance to mandatory suspension under s28(1)(a). In *Kearon* the driver was charged under reg. 1001(1)(c) of the *Road Safety (Traffic) Regulations* 1988 with exceeding the speed indicated on a speed restriction sign in a speed zone. The degree by which the driver exceeded the speed limit played no part in the reasoning of the Court.
>
> 73. Indeed, in my view, it would make no sense at all, having regard to the reasoning behind the conclusion that the offence was one of strict liability, to pay any attention to whether the alleged speed exceeded the speed limit by a few or by many kilometres per hour. Much public attention has been drawn to the self-evident fact that exceeding a speed limit by just a few notches can cause injury as readily as driving at speeds well above a limit.
>
> 74. In the County Court Mr Agar appears to have argued that *Kearon* was wrong because it did not take into account the reasoning of the High Court in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553. That argument featured less in the submissions before me, the focus being upon the asserted ground for distinguishing *Kearon* from the present as already discussed. To the extent Mr Agar still relies upon an error in failing to apply *He Kaw Teh* instead of *Kearon*, I have been unable to discern any basis for finding an error.
>
> 75. In conclusion, his Honour was not in error in declining to afford to Mr Agar the defence of honest and reasonable mistake of fact (assuming for present purposes that such a defence might have been made out on the facts of the case)."

Per Macaulay J in *Agar v Dolheguy & Anor* [2010] VSC 506; (2010) 246 FLR 179; MC 50/2010, 11 November 2010.

(n) Infringement notice alleging use of unregistered motor vehicle

1. *Obiter*: In relation to the criteria for determining whether the defence of honest and reasonable mistake of fact is available, the first criterion is consideration of the words of the statute creating the offence; the second criterion is consideration of the subject matter of the statute. The third criterion is whether subjecting the defendant to absolute liability will assist in the promotion of observance of the relevant statute. The fourth criterion is that where a statute creates an offence for the purpose of regulating social conditions and public safety and where the penalty attached to a statutory offence is monetary and moderately sized, the statute is more easily regarded as imposing absolute liability.

He Kaw Teh v R [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, applied.

2. In relation to the first criterion, the language of s7 of the Act as a whole strongly indicated that an offence against s7(1)(a) was one of absolute liability.

3. In relation to the second criterion, the Act was concerned with road use, registration of vehicles and trailers and licensing. Issues of public safety will often arise which indicated that the subject matter of the offence was a matter of social seriousness but did not involve grave moral fault and was not criminal in any real sense.

4. The third criterion was whether absolute liability would assist in the observance of the statute. The fact that the legislature had chosen to penalise drivers who may not have owned the vehicle they were driving indicated a legislative intent to cast a wide and effective net. To penalise drivers as well as owners indicated that the purpose of s7(1) of the Act as a whole was to keep as many unregistered (and potentially unsafe) vehicles as possible off the roads. That purpose was furthered by an absolute liability offence for drivers as well as owners. The absence of an honest and reasonable mistake defence should have encouraged drivers who had doubts about the registration of a vehicle to refuse to drive the vehicle without some objective proof of its registration. On the other hand, if the defence were available, the prosecution of the offence could have become very difficult.

5. In relation to the fourth criterion, there was no doubt that the object which the Act was designed to achieve was to secure the public welfare and to promote the safety of the public. The legislature must have been taken to have subordinated the interests of individuals to the interests of the public and to have intended that any hardship resulting to an individual by the application of the ordinary rule of interpreting a statutory provision in accordance with its natural and literal meaning, and by the imposition of strict liability for infringement of the particular section, was to give way to the public interest. If no current registration label was affixed, the prudent course was not to drive the vehicle. Further, the monetary penalty was a moderate one and no stigma attached to a conviction for this regulatory offence. Finally, no prison sentence was prescribed for the offence.

6. Having regard to these matters, an offence against s7(1)(a) of the Act was an offence of absolute liability for which the defence of honest and reasonable mistake was not available.

Pilkington v Elliott [1991] VicSC 510; MC 20/1997, followed.

Per Cavanough J:

"80. Mr Tsolacis relies on *Pilkington v Elliot*[61], which concerned a charge under s7(1)(b) of the *Road Safety Act* ('Act') of owning an unregistered vehicle used on a highway. Mr Tsolacis relies particularly on the following passage in the judgment of Coldrey J:

> The words of s7 simply prohibit a person owning a motor vehicle or trailer which is used on a highway and is unregistered. On its face the clear and concise language in which the provision is couched, together with its objective form, clearly indicate, in my view, a legislative intention to impose strict liability upon the owner of an unregistered vehicle used on a highway.[62]

81. Mr Tsolacis submits that Coldrey J found that an offence under s7(1)(b) is a "strict liability offence" and that, therefore, the defence of honest and reasonable mistake of fact is available. He submits that, by analogy, the defence is also available for an offence of using an unregistered vehicle contrary to s7(1)(a).[63]

82. Mr Tsolacis' submission is plainly misconceived. As Coldrey J himself noted, the terms "strict liability" and "absolute liability" are often used interchangeably.[64] In the passage quoted above, Coldrey J was saying, in effect, that the offence created by s7(1)(b) was one of absolute liability. This is obvious, because Coldrey J went on to say that 'honest and reasonable mistake is not a defence to a charge under s7(1)(b)'[65]; and because it was common ground that there was no requirement to prove *mens rea* in the ordinary sense of intent or guilty knowledge.[66]

83. Coldrey J referred to the principles for determining whether an offence is one of absolute liability stated by Dixon J in *Proudman v Dayman*:[67]

> As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.
>
> The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered. But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one.

> Indeed, there has been a marked and growing tendency to treat the *prima facie* rule as excluded or rebutted in the case of summary offences created by modern statutes, particularly those dealing with social and industrial regulation.

84. Coldrey J also set out the following well known passage in the judgment of Dawson J in *He Kaw Teh v R*:[68]

> Attempts have been made to categorize those offences which have been regarded as absolute, but the result is only helpful in a broad sense and the recognized categories cannot be regarded as exhaustive. It is generally accepted that statutes which create offences for the purpose of regulating social or industrial conditions or to protect the revenue, particularly if the penalty is monetary and not too large, may more easily be regarded as imposing absolute liability. This approach may be displaced if to regard an offence as one of absolute liability could not promote the object of the legislation by making people govern their behaviour accordingly. See *Lim Chin Aik v R* (1963) AC 160; [1963] 1 All ER 223; (1963) 2 WLR 42. Conduct prohibited by legislation which is of a regulatory nature is sometimes said not to be criminal in any real sense, the prohibition being imposed in the public interest rather than as a condemnation of individual behaviour. On the other hand, if a prohibition is directed at a grave social evil, the absolute nature of the offence may more readily be seen, particularly if proof of intent would be difficult and would represent a real impediment to the successful prosecution of offenders.

85. In finding that the offence of owning an unregistered vehicle used on a highway was not subject to the defence of honest and reasonable mistake, Coldrey J referred to certain additional authorities[69] and took into account several factors. His Honour observed that it was beyond argument that the RSA is concerned with public safety.[70] This weakened the presumption that the defence was available. Coldrey J also found the offence in s7(1)(b) to be a 'regulatory offence', punishable by a monetary penalty.[71] His Honour noted that no stigma attached to a conviction; that a defendant was able to comply with the subsection with relative ease; and that the owner of a vehicle is in a unique position to ensure that it is registered.[72] His Honour also observed that absolute liability would assist enforcement of the subsection, as car owners would usually be in a position to ensure that their practices promoted the observance of the subsection.[73]

86. Although Coldrey J acknowledged that the imposition of absolute liability could create hardship in some cases (for example, if an unregistered vehicle was stolen and driven on a highway), such injustices could be avoided by the sensible exercise of prosecutorial discretion and by the court's ability to dismiss any charge as trifling.[74]

87. Mr Tsolacis has not submitted in terms that the judgment of Coldrey J in *Pilkington v Elliot* was wrong. However, having regard to Mr Tsolacis' unrepresented status, I have considered that question. I would only be justified in declining to treat *Pilkington v Elliot* as correctly decided if I was satisfied that it was "clearly wrong".[75] I am far from being so satisfied. Indeed, in my view, his Honour's conclusion was correct, for the reasons his Honour gave. I note that the judgment has stood unchallenged for some 20 years now.

88. Mr Tsolacis refers to *Kidd v Reeves*.[76] In that case, Menhennitt J held that the defence of "honest and reasonable belief" was available in relation to a charge of driving a motor vehicle while the person's licence to drive was suspended, contrary to s28(1) of the *Motor Car Act* 1958.[77] However, in *Pilkington v Elliot* Coldrey J expressly distinguished *Kidd v Reeves*. Applying an observation made by Marks J in *Cumming v Melbourne Towing Service Pty Ltd*[78] to the effect that "each statutory provision had to be considered on its own and interpreted according to such common sense and intuition as the judicial mind can bring to bear on it", Coldrey J determined that a different conclusion was to be drawn in relation to s7(1)(b) of the RSA, noting in particular that the penalty was monetary only. By contrast, imprisonment could be imposed for a second offence of driving while suspended or disqualified.

89. Coldrey J analysed carefully various other authorities which had been cited to him. One was *Welsh v Donnelly*,[79] a decision of the Full Court of this Court handed down in 1982. This was, of course, subsequent to *Kidd v Reeves*, although that case was not referred to in *Welsh v Donnelly*. The Full Court held that an offence of driving a vehicle of excessive weight contrary to s33(1)(h) of the *Motor Car Act* 1958 was an offence of absolute liability. As Coldrey J later noted,[80] in *Welsh v Donnelly* Southwell J expressed agreement with the approach taken by the South Australian Full Court in 1981 in *Franklin v Stacey*,[81] in which it was held that the relevant South Australian legislation imposed absolute liability for driving an unregistered and uninsured vehicle.[82] Coldrey J was pressed with the subsequent (1983) decision of the South Australian Full Court in *Burnett v LF Jeffries Nominees Pty Ltd*,[83] a case relating to the offence of driving or owning an overloaded vehicle, contrary to the *Road Traffic Act* 1961-1981 (SA). In *Burnett*,[84] the South Australian Full Court held that *Franklin v Stacey* was distinguishable because of the existence of a statutory "special reasons" defence in relation to the offence of driving an uninsured vehicle. However, in *Pilkington v Elliot*,[85] Coldrey J pointed

out that the "so called distinction referred to in *Burnett's case* could relate only to the driving of an uninsured vehicle, since no 'special reasons' defence existed in relation to driving an unregistered vehicle"; and Coldrey J commented that the distinction was therefore "more apparent than real".

90. Since *Pilkington v Elliot*, there have been one or two decisions in other States in which, it might be said, the *Proudman v Dayman* defence has been given greater scope for application in road traffic matters than Coldrey J was prepared to allow it in *Pilkington v Elliot*. For example, in *DPP (NSW) v Bone*,[86] a decision of Adams J of the Supreme Court of New South Wales, it was held that the drink driving offence in question was not an offence of absolute liability. However, the only Victorian case to which his Honour referred was *Kidd v Reeves*. His Honour made no mention of *Skase v Holmes*,[87] in which Vincent J held that the corresponding drink driving offence in Victoria was an offence of absolute liability. In *Skase v Holmes*, Vincent J observed that, at least since *Welsh v Donnelly*, the relevant Victorian drink driving offence "has been regarded as one of strict liability". Clearly, Vincent J meant absolute liability, because his Honour held that the defence of honest and reasonable mistake was not available.[88] Importantly for present purposes, Vincent J referred with apparent approval to *Pilkington v Elliot* as a case in the same line as *Welsh v Donnelly*. Another Victorian case in that same line, as Vincent J also noted, was *Kearon v Grant*.[89] In *Kearon v Grant*, the Appeal Division of this Court held that the offence of exceeding 60 kilometres per hour contrary to the regulations under the RSA was an offence of absolute liability. The leading judgment was delivered by Brooking J, who referred with approval[90] to the above-mentioned part of the judgment of Southwell J in *Welsh v Donnelly*, wherein Southwell J cited a passage from *Franklin v Stacey* "concerning the subordination of interests of individuals to the interest of the public in view of the purpose and policy of the statute, the *Motor Vehicles Act*, as securing the public welfare and promoting safety of the public".[91] As Macaulay J said more recently in *Agar v Dolheguy*,[92] the force of the reasoning of Brooking J in *Kearon v Grant* still applies, and so does the authority of the decision.

91. In my view, the overwhelming weight of authority in this Court compels me to hold that the decision of Coldrey J in *Pilkington v Elliot* was and remains correct in law. I propose to follow it.

92. The question before me, therefore, becomes whether, on the proper construction of s7 of the RSA, there is a relevant difference between driving an unregistered vehicle and owning an unregistered vehicle driven on a highway, such that the *Proudman v Dayman* defence is available for the former offence despite being unavailable for the latter.

93. Mr Tsolacis submits that a key difference between the two offences is that a driver who does not own a vehicle has no real ability to verify its registration status.[93] He submits that a driver cannot be reasonably expected to do more than ask the owner to confirm that a vehicle is registered and must rely on the owner to give an accurate answer.[94] Mr Tsolacis submits that it is therefore unreasonable to penalise a driver for a situation which the driver could not reasonably be expected to guard against. He submits that it could not have been Parliament's intention to penalise a person who not only did not intend to commit an offence but who, by making enquiries of the owner of the vehicle, took positive steps to avoid it.

94. Mr Tsolacis also notes that, under the *Interstate Road Transport Act* 1985 (Cth), driving an unregistered interstate road transport vehicle on a road is an offence of strict liability (as distinct from absolute liability), for which the defence of honest and reasonable mistake of fact is available.[95] He submits that, whilst not binding, this is a relevant consideration in considering the Victorian provisions.

95. Although some of Mr Tsolacis' submissions have some force, in the end I am not satisfied that they lead to the conclusion that the defence of honest and reasonable mistake is available for an offence against s7(1)(a) of the RSA.

96. The fact that Commonwealth legislation expressly characterises the above-mentioned Commonwealth offence as one of (merely) strict liability is, at best for Mr Tsolacis, neutral. Section 7(1) of the RSA must be construed in its own legislative context and by reference to its own words.[96]

97. The High Court's ruling in *He Kaw Teh* regarding the criteria for determining whether the presumption of a mental element (and, by implication, the defence of honest and reasonable mistake of fact) has been displaced was summarised by Warren J, as her Honour the Chief Justice then was, in *Wilson v Gahan*:[97]

> In *He Kaw Teh* the High Court referred to the fact that the courts have set down criteria to be applied in determining whether the presumption of *mens rea* has been displaced. The first criterion is consideration of the words of the statute creating the offence (see Gibbs CJ and Mason J 529; Brennan J 567; Dawson J 594). The second criterion is consideration of the subject matter of the statute (see Gibbs CJ and Mason J 529; Dawson J 594). The third criterion is whether subjecting

> the defendant to absolute liability will assist in the promotion of observance of the relevant statute (see Gibbs CJ and Mason J 530; Brennan J 567). The fourth criterion is that where a statute creates an offence for the purpose of regulating social conditions and public safety and where the penalty attached to a statutory offence is monetary and moderately sized, the statute is more easily regarded as imposing absolute liability (see Brennan J 567; Dawson J 595).

98. I will apply each of these criteria in turn.

99. Especially on the assumption that s7(1)(b) creates an offence of absolute liability, the language of s7 as a whole strongly indicates that an offence against s7(1)(a) is one of absolute liability. As the respondent submits, the words of the RSA make no relevant distinction between the offences in ss7(1)(a) and (b).[98] The offences are contained in the same subsection and are subject to the same penalty. There is nothing to indicate that the legislature intended the two offences to have different requirements regarding any mental element. The offences in s7(1) are to be contrasted with the offences in s7(2) which refer to a registered operator 'permitting' or 'allowing' a motor vehicle to be used in breach of a condition of its registration. The notions of permitting or allowing were noted by Coldrey J in *Pilkington v Elliot* to 'arguably import a defence of honest and reasonable mistake'.[99]

100. The RSA also contains a 'reasonable steps' defence in relation to other offences, but not in respect of the offences set out in s7(1). Under s179 of the RSA, that defence is established where:

> (a) the person did not know, and could not reasonably be expected to have known, of the conduct that constituted the commission of the offence; and
>
> (b) either—
> (i) the person had taken all reasonable steps to prevent that conduct from occurring; or
> (ii) there were no steps that the person could reasonably be expected to have taken to prevent the conduct from occurring.

This appears to subsume any honest and reasonable mistake defence. A person who could make out paragraph (a) of the statutory reasonable steps defence would also ordinarily be able to establish honest and reasonable mistake as a defence at common law. The fact that the statute expressly includes this defence for certain offences under the RSA but not for s7(1) suggests to me that no such defence is to be available in the case of offences against s7(1).[100]

101. I now turn to the second broad criterion extracted from *He Kaw Teh*, namely the subject matter of the statute. The RSA is concerned with road use, registration of vehicles and trailers and licensing.[101] Issues of public safety will often arise, which indicates that the subject matter of the offence is 'a matter of social seriousness', to borrow the language of Warren J in *Wilson v Gahan*.[102] However, unlike the importation or possession for sale of heroin,[103] the offence of driving an unregistered vehicle does not involve grave moral fault. Driving an unregistered vehicle is not 'criminal in any real sense'.[104] The RSA is principally concerned with matters of public safety and regulation of road use, which are of public concern regardless of the intention or other mental state of the accused. The second criterion further weakens the presumption that the defence of honest and reasonable mistake of fact applies to s7(1)(a).

102. The third criterion to be considered is whether absolute liability will assist in the observance of the statute. This will often be the case where the law seeks to compel a person to actively change their practices to avoid the possibility that the external elements of the offence might occur, regardless of the person's intent.[105] The fact that the legislature has chosen to penalise drivers who may not own the vehicle they are driving indicates a legislative intent to cast a wide and effective net. To penalise drivers as well as owners indicates that the purpose of s7(1) as a whole is to keep as many unregistered (and potentially unsafe) vehicles as possible off the roads. That purpose is furthered by an absolute liability offence for drivers as well as owners. The absence of an honest and reasonable mistake defence should encourage drivers who have doubts about the registration of a vehicle to refuse to drive the vehicle without some objective proof of its registration. On the other hand, if the defence were available, the prosecution of the offence may become very difficult.

103. The fourth criterion is that, where the statute creates an offence for the purpose of regulating social conditions and public safety, and where the penalty attached is monetary and moderately sized, it is more easily viewed as imposing absolute liability. As noted above, in *Pilkington v Elliot*, Coldrey J held that it is beyond argument that the RSA is concerned with public safety.[106] If anything, this is even more true of s7(1)(a)'s prohibition of the driving of an unregistered vehicle than it is of s7(1)(b)'s prohibition of the owning of an unregistered vehicle which is driven on a highway. In the second reading speech for the RSA, the Minister stated that the purposes of the provisions of the RSA concerning registration (ie Part 2, which include s7(1)(a)) are:

> to ensure that the design, construction and equipment of motor vehicles and trailers which are used on a highway meet safety and environmental standards; to enable the use of motor vehicles and trailers on highways to be regulated for reasons of safety, protection of the environment and law enforcement, and to provide a method of establishing the identity of each motor vehicle or trailer which is used on a highway and of the person who is responsible for it.[107]

104. The Minister went on to state that:

> If there is to be safe, efficient and equitable road use, it is necessary that drivers and vehicles comply with the standards set by the legislation. The Government is particularly concerned with the number of unlicensed drivers and unregistered vehicles on the road. This anti-social behaviour must be eliminated as far as possible and the Bill does this in a number of ways.[108]

105. The Minister's comments highlight the regulatory nature of s7(1)(a) and Part 2 in general. In 1986, when the RSA was enacted, and for many years before, it was a matter of common knowledge that a vehicle could not be registered or transferred to a new owner or operator in Victoria without a roadworthy certificate. The relevant legislative requirements were clearly aimed at ensuring that vehicles on Victorian highways met safety and environmental standards with a view to maintaining or improving road safety.[109]

106. The importance of the public safety purpose of prohibiting the driving of an unregistered motor vehicle was highlighted by Walters J in the above-mentioned case of *Franklin v Stacey*.[110] The facts of that case are very similar to those of the present case. Mr Stacey borrowed a motorcycle from his friend Mr Jones. Before borrowing it, Mr Stacey noticed that the motorcycle had no registration label affixed. He asked Mr Jones whether the motorcycle was registered and insured, and Mr Jones told him that it was. The motorcycle was in fact neither registered nor insured. Mr Stacey was prosecuted for driving an unregistered vehicle and for driving an uninsured vehicle.

107. As I have said, the Full Court of the Supreme Court of South Australia found that driving an unregistered vehicle was an absolute liability offence under the relevant South Australian legislation. Walters J (with whom Wells and Jacobs JJ agreed) said:

> There can be no doubt that the object which the *Motor Vehicles Act*, read as a whole, is designed to achieve is to secure the public welfare and to promote the safety of the public. In the case of s9 [which prohibited the driving of an unregistered vehicle], the manifest purpose of the legislature is to ensure that save in certain excepted cases, a motor vehicle shall not be used on our public roads unless (*inter alia*) the vehicle has been registered...
> ...
>
> I think, therefore, that in enacting ss9 and 102 of the Act [the latter of which prohibited the driving of an uninsured vehicle], the legislature must be taken to have subordinated the interests of individuals to the interests of the public and to have intended that any hardship resulting to an individual by the application of the ordinary rule of interpreting a statutory provision in accordance with its natural and literal meaning, and by the imposition of strict liability for infringement of the particular section, is to give way to the public interest.[111]

108. Section 7(1)(a)'s monetary penalty of up to 25 penalty units (totalling $2920.50 at the date of the offence) for a first offence by an individual is a moderate one. There is no stigma attached to a conviction under s7(1)(a) which, as noted above, is a regulatory offence. Nor is a prison sentence prescribed for the offence. The fourth criterion also leans towards characterising s7(1)(a) as imposing absolute liability .

109. It has always been relatively easy to comply with s7(1)(a) (and its predecessors). For decades it has been compulsory in Victoria that a registered vehicle display a registration label.[112] A driver has always been able to determine easily whether or not a vehicle is registered. If no current label is affixed, the prudent course is not to drive the vehicle. This is yet another indication that weakens the presumption that the honest and reasonable mistake defence is available.[113]

110. I recognise, as did Coldrey J in *Pilkington v Elliot* and Walters J in *Franklin v Stacey*, that any offence of absolute liability may give rise to an unjust situation in some cases. Nevertheless, I concur with the comments of Walters J that, in matters of public safety, and particularly road safety, it is not surprising that the legislature would choose to subordinate the interests of individuals to the public interest. I also echo the comment of Coldrey J that any injustice can be avoided by the sensible exercise of either prosecutorial or sentencing discretion. In the absence of the defect in the certificate, this very case would have presented an example.

111. For all of those reasons, it is my view that an offence against s7(1)(a) of the RSA is an offence of absolute liability for which the defence of honest and reasonable mistake is not available."

[61] [1991] VicSC 510; MC 20/1997, unreported, Supreme Court of Victoria, Coldrey J, 27 September 1991.
[62] *Ibid*, 15.
[63] SC transcript, 20-22.
[64] *Pilkington v Elliot*, 6.
[65] *Ibid*, 17.
[66] *Ibid*, 7.
[67] [1941] HCA 28; (1941) 67 CLR 536, 540.
[68] [1985] HCA 43; (1985) 157 CLR 523, [13]; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[69] See further below.
[70] *Pilkington v Elliot*, 8–10.
[71] *Ibid*, 15.
[72] *Ibid*, 15.
[73] *Ibid*, 16.
[74] *Ibid*, 16–17. The corresponding power is now contained in s76 of the *Sentencing Act* 1991.
[75] *Tomasevic v Travaglini* [2007] VSC 337; [2007] 17 VR 100 (Bell J) at 105 [21]-[24] and cases there cited; *Engbretson v Bartlett* [2007] VSC 163 (Bell J) at [63]; (2007) 16 VR 417; (2007) 172 A Crim R 304.
[76] [1972] VicSC 61; [1972] VicRp 64; [1972] VR 563.
[77] The predecessor of the RSA.
[78] (1984) 2 MVR 157.
[79] [1983] VicRp 79; [1983] 2 VR 173.
[80] *Pilkington v Elliot*, 13.
[81] (1981) 27 SASR 490.
[82] See further below.
[83] (1983) 33 SASR 124.
[84] At 133.
[85] At 13.
[86] [2005] NSWSC 1239; (2005) 64 NSWLR 735; (2005) 158 A Crim R 215; (2005) 44 MVR 354; followed in *Maher v Carpenter* [2012] ACTSC 38.
[87] [1995] VicSC 555, unreported, Supreme Court of Victoria, Vincent J, 11 October 1995 BC 9508019.
[88] *Ibid*, page 8.
[89] [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377.
[90] At 323.
[91] *Ibid*.
[92] [2010] VSC 506 at [71]; (2010) 246 FLR 179.
[93] SC transcript, 44.
[94] *Ibid*.
[95] *Interstate Road Transport Act* 1985 (Cth), s8; *Criminal Code* (Cth), s6.1.
[96] *Pilkington v Elliot*, 11-12.
[97] [1999] VSC 72 at [9].
[98] SC transcript, 108.
[99] *Pilkington v Elliot*, 14 – 15. See also *Collette v Bennett* (1986) 21 A Crim R 410; (1986) 3 MVR 141.
[100] Compare *Burnett v LF Jeffries Nominees Pty Ltd* (1983) 33 SASR 124; and compare *Pilkington v Elliot*, 13-14.
[101] As set out in RSA, s1.
[102] [1999] VSC 72 at [17].
[103] See *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523 at 529; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[104] *Sherras v De Rutzen* (1895) 1 QB 918, 922; 11 TLR 369; *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523, per Gibbs CJ at [6] and [13]; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[105] *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523, per Brennan J at 567; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[106] *Pilkington v Elliot*, 8–10.
[107] Victoria, *Parliamentary Debates*, Legislative Assembly, 11 September 1986, 227 – 228 (Thomas Roper, Minister for Transport).
[108] *Ibid*, 228.
[109] The corresponding requirements as at 22 July 2009 were contained in RS(V)R 1999 r202(1)(a), r211(f) and Schedule 8 to those regulations.
[110] (1981) 27 SASR 490.
[111] *Ibid*, 493. It is clear from the rest of the decision that when using the word 'strict liability', his Honour was intending to convey that the defence of honest and reasonable mistake was not open.
[112] For provisions to this effect in force as at the day of the alleged offence, see Regulations 223(3), (4) and (7) *Road Safety (Vehicles) Regulations* 1999; rr52 and 55 *Road Safety (Vehicles) Regulations* 2009.
[113] *Pilkington v Elliot*, 15; *Kain & Shelton Pty Ltd v McDonald* (1971) 1 SASR 39, 43.

Per Cavanough J in *Tsolacis v McKinnon* [2012] VSC 627; MC 01/2013, 21 December 2012.

(o) Committing indecent act in presence of children aged under 16 years – whether honest and reasonable mistake as to age was a defence

1. Whether intention or knowledge apply to elements of a statutory offence turns on the interpretation of the provision in question. Whether honest and reasonable mistake of fact is a defence also raises a question of statutory interpretation. According to the applicable principles, there is an interpretative presumption that intention and knowledge must be proved in respect of all of the elements or, if not that, then honest and reasonable mistake is a defence, subject to Parliament's plain contrary intention. When considering whether that plain contrary intention is indicated, the court examines the subject matter and the purpose of the legislation, the terms of the legislation and whether criminal liability without intention or knowledge, or honest and reasonable mistake as a defence, would promote observance of the legislative scheme.

2. After examining these matters, the trial judge was correct in deciding that, in respect of the age ingredient, intention and knowledge were not elements of the offence and honest and reasonable mistake was not a defence. The purposes of s47(1) of the *Crimes Act* 1958 are to protect children under the age of 16 years from exposure to indecent acts and to deter potential offenders from engaging in such acts in places where children might be. The purpose of the provision is as much to protect children from themselves as it is to protect them from others. Those purposes and promoting observance of the legislative scheme (among other things) plainly indicate that Parliament intended the offence to be one of absolute liability in relation to the age ingredient. Persons who commit indecent acts in places where children might be do so at their own peril.

3. In reaching this conclusion, the Court took into account that it is possible for potential offenders to take reasonable precautions to avoid criminal liability. On the interpretation which was plainly intended by Parliament, it was not possible to offend against s47(1) by accident. To be convicted, the accused must have intended to commit an indecent act. Potential offenders can avoid liability by not committing such acts in places where children might be. So interpreted, the provision imposes on persons an obligation to take greater than usual care to avoid criminal liability. Parliament has deliberately imposed that obligation to take greater than usual care in order to protect children from others and also to protect children from themselves. This interpretation accords not just with Parliament's plain intention but also with decisions of the Full Court of the Supreme Court in relation to similar statutory provisions.

Per Bell J:

> "... 106. According the authorities which I have discussed, there is a presumption of interpretation that intention or knowledge is an ingredient of all of the elements of the offence in s47(1) (of the *Crimes Act* 1958) or, if not that, then honest and reasonable mistake as to age is a defence, unless Parliament has plainly revealed a contrary intention expressly or by necessary implication. In determining whether that contrary intention is plainly revealed, it is necessary to examine the subject matter and purpose of the legislation creating the offence, the terms of the legislation and whether criminal liability without intention or knowledge, or honest and reasonable mistake of age as a defence, would promote the observance of the legislative scheme. ...
>
> **Promoting observance of legislative scheme**
>
> 139. As I understand the authorities, the purposes of the criminal law include protecting the community and deterring wrongdoers while at the same time respecting the fundamental rights of persons. Those purposes are not well served by convicting persons of crimes which they did not intend to commit. Therefore, when interpreting a criminal provision, it is presumed that the prosecution must prove a guilty mind or, in some circumstances, at least an absence of honest and reasonable mistake of fact, subject to plain contrary legislative intention. In determining whether that intention has been made plain, it is necessary to take into account promoting observance of the legislative scheme, among other things. This is not a coarse or robust exercise. It cannot simply be reasoned that the observance of the provision would be promoted by adopting an absolute or strict liability interpretation because it would make it easier for the prosecution to obtain convictions. If that were to be permissible, the interpretative presumption would be a mirage. The question is not so much whether prosecution would be made easier by adopting such an interpretation but how absolute or strict liability would promote the observance of the provision by potential offenders.
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> 140. In that regard, it is necessary to consider whether absolute or strict liability would turn a luckless person who had no intention to commit an offence, or one who could not take reasonable avoiding precautions, into a criminal. Especially in relation to serious offences, people are generally liable to conviction and punishment because they are personally responsible for intentionally allowing their

standard of behaviour to fall below a legislated norm, not because they have accidentally stumbled into a criminal liability trap. An interpretation in favour of absolute or strict liability would not promote observance of the provision in those circumstances.

141. That is the significance of the observations of Brennan J in *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 to which I earlier drew attention. In determining whether the presumption was displaced, his Honour placed stress on whether, so interpreted, the provision in question allowed the individual to take reasonable avoiding action. If the provision allowed the individual to do so, the courts would be more likely to hold that, on a proper interpretation, liability was intended to be absolute and that a potential offender would commit the proscribed act at their peril. It could not be said in such circumstances that the provision would operate like a criminal liability trap. The potential offender would only be liable if he or she had intentionally done or not done something which was reasonably avoidable.

142. The application of these principles is well illustrated by the decision of the Court of Criminal Appeal of the Supreme Court of South Australia in *Clark* [2008] SASC 100; (2008) 100 SASR 363; 183 A Crim R 581 (Doyle CJ, Bleby and David JJ). As we have seen, the court considered carefully whether the enforcement of the offence of producing pornography with under-age persons as one of absolute liability would 'give rise to a likelihood that luckless or innocent persons will be convicted, without serving any useful purpose', to use the words of Doyle CJ. That took the court to a consideration of the circumstances in which the offence was likely to be committed and the avoidance action which was reasonably open to potential offenders. You will recall that the High Court refused special leave to appeal against this decision.

143. With that in mind, I turn to s47. Now, s47 does not criminalise 'indecent' acts which are committed when the accused is alone or with or in the presence of someone who is not under the statutory age. Putting aside s47(2), the act is criminal when an act which is indecent is wilfully committed by the offender with or in the presence of a person under that age. Relevantly to this case, the crime is constituted by the wilful committing of the indecent act and the presence of such a person. Therefore, potential offenders are those who might intentionally and knowingly commit an indecent act and do so with or in the presence of a child under the age of 16 years.

144. If s47(1) operates as an offence of absolute liability in relation to the age ingredient, it cannot be said that such potential offenders might be subject to futile prosecution for their luckless and accidental behaviour. The potential offender deliberately will have put themselves at risk of offending by intentionally committing an act which is indecent and doing so with or in the presence of another person or other persons when they cannot be sure that the other person is or all the other persons are above the statutory age. Potential offenders can take reasonable avoiding action by not committing indecent acts with or in the presence of a person or persons when they cannot be so sure.

145. A problem is that it is not easy to be sure that a young person is over or under the age of 16 years. The age of children is not stamped on their foreheads. It is common knowledge that, by their mature appearance, many children who are under the age of 16 years can and do deceive others into believing honestly that they are above that age. Moreover, as such children can and do behave in that way, it is not easy to be sure that they will not have made their way into some place where they not allowed to be. To use the present case as an example, it not easy to be sure that, in a public aquatic centre, there will be nobody under the age of 16 years in a spa, sauna and steam room area which is reserved for people over that age. But, in my view, all of this is reasonably foreseeable.

146. Because this is reasonably foreseeable, potential offenders can take it into account when choosing whether or not deliberately to commit an indecent act in the presence of people in such a place. They can take reasonably avoiding action simply by refraining from the commission of indecent acts where children might be. If a potential offender goes ahead anyway and a person present happens to be a child under the age of 16 years, the offender has committed the act at their offender peril. It is not right to say that the offender has walked accidentally into a situation where he or she might commit an indecent act in the presence of that child. An interpretation of absolute liability would promote the observance of the provision in those circumstances. Those are the circumstances of the present case.

147. So interpreted, s47(1) would impose on potential offenders a greater duty of care to avoid liability than is normally required under the criminal law. The authorities establish that a court would not lightly interpret a provision in such a way. However, the subject matter and purposes of s47 combine with the promotion of the observance of the legislative scheme to suggest that this was Parliament's plain intention.

148. The subject matter of s47(1) is the offence of committing an indecent act in the presence of a child under the age of 16 years. The cardinal purposes of the provision are protecting children from

such acts, which includes protecting children from themselves, and deterring potential offenders. Imposing on potential offenders a duty of greater vigilance to avoid liability is consistent with the nature of the offence and the purpose of the provision: for the effective protection of children from indecent acts which children may in their immaturity seek out, the provision requires potential offenders to do more than usually required to avoid exposing children to such acts. Absolute liability promotes the observance of the provision in this way. Strict liability would do so to a significantly lesser extent. The force of this consideration is not as great in the case of child offenders who themselves may lack decision-making maturity. But the main target of the provision is the adult offender from whom children need protection most.

Presumption displaced

149. The subject matter and purpose of the legislation, the terms of the legislation and promoting observance of the legislative scheme plainly indicate by necessary implication that the interpretative presumption has been displaced and that Parliament intended the crime in s47(1) to be one of absolute liability in respect of the age ingredient. In cases not involving consent as covered by s47(2), honest and reasonable mistake of age is not available as a defence and the judge was correct to so conclude. The plaintiff's application for judicial review of his convictions and sentences on the charges relating to the first and second complainants will be dismissed."

Per Bell J in *Azadzoi v County Court of Victoria and Kara Roden* [2013] VSC 161; MC 24/2013, 12 April 2013.

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20 March 2014